

UNITED STATES OF AMERICA
UNITED COAST GUARD vs.
LICENSE NO. 473 105 AND MERCHANT MARINER'S DOCUMENT
Issued to: William Wesley Hewitt Z-067 44 5868

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2223

William Wesley Hewitt

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 4 September 1979, an Administrative Law Judge of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's documents for three months, on twelve months' probation, upon finding him guilty of misconduct. The specification found proved alleged that while acting under authority of the license above captioned, on or about 8 May 1979, Appellant wrongfully and fraudulently executed a false application for a raise in grade of his licensed to Master by certifying that he had not made application for a license and been rejected within twelve months. A second specification concerning an unfair practice allegedly occurring on 26 April 1979 in New York was dismissed.

The hearing was held at Baltimore on 12 June 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence six documents.

In defense, Appellant offered in evidence three documents.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and one specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 5 September 1979. Appeal was timely filed on 4 October 1979.

FINDINGS OF FACT

On 8 May 1979, Appellant was acting under authority of his license when he made application for raise in grade of his license to Master in the port of Baltimore at the U.S. Coast Guard Marine Safety Office. On the application, Appellant certified that he had not made application for a license of any type to an Officer-in-Charge, Marine Inspection (OCMI) in any other port and been rejected within twelve months of the date of application in Baltimore.

On 16 January 1979, prior to the Baltimore application, Appellant made a similar application for raise in grade at the U.S. Coast Guard Marine Inspection Office, New York, New York. Appellant took portions of the required competency examinations at New York on 26 April 1979. It was discovered in New York that Appellant had secreted a copy of CG-169 (Navigation Rules) in the men's room used by examinees. Appellant had unaccompanied access to this room during the Rules of the Road portion of the exam, which must be completed without recourse to reference materials. On 27 April, Appellant agreed to accept a failure rather than be charged under R.S. 4450.

After making application in Baltimore, Appellant sat for and completed the Master's examination on 25-25 May 1979. On the examination form Appellant indicated that it was a reexamination.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended by Appellant that the decision and order are not supported by substantial evidence of a reliable and probative character and that in addition Appellant's certification was without effect in light of the ambiguities inherent in the language of the certification.

OPINION

I

Appellant contends that the record lacks substantial evidence to support the decision and order of the Administrative Law Judge. A review of the documentation which constitutes the sum total of evidence in this matter belies Appellant's assertion. Appellant made application for a raise in New York on 16 January 1979. Exhibit 2. He accepted a failure on the examination for raise in grade, on 27 April 1979. Exhibit 5. On 8 May 1979, Appellant again made application for a raise in grade, in Baltimore. Exhibit 3. It is also apparent that Appellant, on his Baltimore application executed a certification which read:

I certify that the information on this application is true,

and that I have not made application for a license of any type of Officer in Charge, Marine Inspection in any other port and been rejected within twelve months of this application.

The evidence herein reliably establishes that Appellant was aware he had failed the exam in New York. The issue of "rejection" versus "failure" was examined in similar circumstances in Decision on Appeal No. 832. It was concluded that an application which did not disclose the fact of a prior application within a year previous constituted false swearing when the applicant knew he had failed at least one prior examination. The Administrative Law Judge was correct in concluding: "where there is a failure in an examination...such failure constitutes a rejection of the application and a refusal of the license applied for... To argue that failing a professional examination is not the same as failing to meet other requirements of [46 CFR 10.02-7] for which a rejection of the application is appropriate...is...a very strained constitution of the regulation."

Appellant's assertion of alleged ambiguity in the statement on the application is predicated on an argument that the rejection of an application is entirely different from the entry of a failure record for the examination for which application had been made. The pertinent regulation, governing the reexamination of an unsuccessful applicant, within a year of an initial application, is 46 CFR 10.02-19. This speaks of an applicant who has been "examined and refused." Whether the process here is thought of as "failure," "rejection," or refusal" the distinction so artfully proposed here is not easily apparent.

It is clear from the record that Appellant well knew that he had been disqualified on his New York application for his own error. In view of the clear language of the regulation that a reexamination could not have been permitted even at New York within a month of his actual notice of failure, Appellant's very appearance at Baltimore less than two weeks after his actual notice of failure at New York undermines whatever credibility his asserted misunderstanding of "reject" as distinct from the other terms might have had.

The language of the application form is not so different from the known facts and the prescribed regulation as to be ambiguous. Accordingly, I concur in the American in the Administrative Law Judge's determination that failure on a Master's exam is clearly a rejection of the application, as the license applied for must be refused.

CONCLUSION

Substantial evidence establishes that Appellant certified falsely with his signature a Certification clause containing information which he knew to be false.

ORDER

The order of the Administrative Law Judge dated at Baltimore, Maryland, on 4 September 1979 is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C.,, this 24th day of July 1980.